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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

ANGELA ANN BERNARD,
as Trustee, etc.,

Plaintiff and Appellant,

v.

ANN ERMAN,

Defendant and Respondent.

B220723

(Los Angeles County
Super. Ct. No. BP072862)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Michael I. Levanas, Judge. Reversed with directions.

Spiegelman & Edwards and Jack Spiegelman for Plaintiff and Appellant.

Reid & Hellyer and Daniel E. Katz for Defendant and Respondent.

Plaintiff and appellant Angela Ann Bernard (Bernard), trustee of the Carmel L. Bosco Revocable Living Trust of August 28, 1991 (Trust) appeals a judgment following a grant of summary judgment in favor of defendant and respondent Ann Erman (Erman).

The essential issue presented is whether the trustee's action against Erman is time-barred.

We conclude Bernard's petition to recover Trust assets which were improperly distributed to Erman was timely because it was filed within two years of the Supreme Court's decision invalidating a trust amendment pursuant to which Erman obtained those monies. Therefore, the judgment is reversed with directions to reinstate the action.

FACTUAL AND PROCEDURAL BACKGROUND¹

On August 28, 1991, decedent Carmel L. Bosco executed the Trust. Over the years, decedent amended the Trust seven times. Plaintiffs, relatives of decedent, sued to invalidate the seventh, and final, amendment.

Decedent was a widow with no children, but was close to her extended family. James Foley (Foley) and his girlfriend, Erman, were longtime personal friends of decedent. For two months before her death, decedent resided at the Riverside home shared by Foley and Erman, who jointly cared for her during her final illness. Decedent died in September 2001, at age 97.

Three days before she died, decedent executed the seventh amendment to the Trust, pursuant to which Foley and Erman each became a 50 percent residuary beneficiary. Neither had been named as a beneficiary in earlier versions of the Trust.

1. Earlier proceedings.

On April 16, 2002, plaintiffs, including Bernard, petitioned to invalidate the seventh amendment to the Trust and for a determination of beneficial interests in the Trust estate. They alleged (1) decedent was dependent on Foley and Erman, inter alia,

¹ This summary is drawn in part from the Supreme Court's decision in *Bernard v. Foley* (2006) 39 Cal.4th 794, and from our later decision in *Foley v. Bernard* [No. 210622, nonpub. opn], filed November 20, 2009.

for custodial care, from approximately July 15, 2001, until her death; (2) the seventh amendment was the product of undue influence by Foley and Erman; (3) decedent lacked testamentary capacity when she executed the seventh amendment because she was gravely ill and heavily sedated; and (4) Foley and Erman were disqualified to receive a testamentary transfer from decedent because they had been her “care custodians” within the meaning of Probate Code section 21350, subdivision (a)(6) and did not fall within any exception to that statute.²

In February 2003, a bench trial was held at which various witnesses testified, including Foley, Erman, and some of the plaintiffs/relatives.³ The trial court denied plaintiffs’ petition and upheld the validity of the seventh amendment, concluding neither Erman nor Foley were care custodians within the meaning of the statute. The trial court entered judgment on the petition on May 7, 2003. On July 7, 2003, plaintiffs filed notice of appeal.

This court reversed, holding Foley and Erman were “care custodians” of decedent within the meaning of the statute and that they had failed to rebut the statutory presumption that decedent’s donative transfer to them was procured by undue influence. We remanded the cause with directions that the trial court enter a new judgment invalidating the seventh amendment to the Trust.

The Supreme Court granted review and affirmed the judgment rendered by this court. (*Bernard v. Foley, supra*, 29 Cal.4th at p. 816.) In its decision filed August 21, 2006, the court addressed “whether close personal friends of a dependent elder who at the end of her life provided her with personal care, including health care, are ‘care custodians’ for the purposes of statutory provisions that presumptively disqualify care custodians as beneficiaries of testamentary transfers from dependent adults to whom they

² All further statutory references are to the Probate Code, unless otherwise specified.

³ On February 18, 2003, during trial, Foley filed a an accounting which showed he distributed \$161,950 to Erman from the Trust.

provide such services. (Prob. Code, §§ 21350, 21351, subd. (d) (hereafter section 21351(d)); Welf. & Inst. Code, § 15610.17, subd. (y).)” (*Bernard v. Foley, supra*, 39 Cal.4th at p. 797.) The court held “when an unrelated person renders substantial, ongoing health services to a dependent adult, that person may be a care custodian for purposes of the statutory scheme at issue, notwithstanding that the service relationship between the individuals arose out of a preexisting personal friendship rather than a professional or occupational connection.” (*Ibid.*)

The remittitur to the superior court issued on October 4, 2006.

2. *Proceedings on remand.*

a. *Removal of Foley as trustee.*

On July 13, 2007, Foley, who was still trustee of the Trust, filed a petition for settlement of account. The plaintiffs filed objections to Foley’s petition, and also filed their own petition, seeking to remove Foley as trustee, surcharge Foley, and appoint Bernard as temporary trustee.

In an order filed March 4, 2008, the trial court sustained the plaintiffs’ objections to Foley’s account and report, and settled and approved the account and report subject to those objections. The trial court found Foley had breached his fiduciary duty to the Trust and its beneficiaries. The trial court, on its own motion, *removed Foley as trustee* and appointed Bernard as temporary trustee. The trial court further found there was no reason for Bernard to post bond “because all trust principal and income appears to have been distributed by [Foley] and no assets remain in the trust estate at the present time.”

b. *Bernard, the new trustee, seeks recovery of Trust assets from Erman.*

On August 28, 2008, Bernard, as trustee, sent a written demand to Erman that she repay the \$161,950 that Foley had distributed to her from the Trust assets. In support, Bernard invoked the judgment invalidating the seventh amendment to the Trust. Erman did not comply with the demand.

On September 24, 2008, Bernard filed a petition for a turnover order under section 850 directing Erman to return to the Trust the sum of \$161,950 which she had obtained from Foley.⁴

Erman demurred on the ground the petition was time-barred by both the two-year statute of limitations (Code Civ. Proc., § 339) and the three-year statute. (Code Civ. Proc., § 338.) The trial court (Hon. Aviva Bobb) overruled the demurrer.

c. Erman's motion for summary judgment.

After Erman's demurrer was overruled, she filed a motion for summary judgment which raised two grounds.

First, the petition under section 850 was based on the allegation that Erman's status as a beneficiary of the Trust was terminated by the August 2006 decision by the California Supreme Court that the seventh amendment to the Trust was invalid. However, Erman was not named as a party in the petition to set aside the seventh amendment – the petition solely named Foley. Because Erman was not made a party, her status as a beneficiary under the seventh amendment had never been adjudicated and she was not bound by the judgment invalidating the seventh amendment. In the absence of an adjudication nullifying Erman's status as a beneficiary under the seventh amendment, she was entitled to summary judgment on the section 850 petition.

Erman further contended that in any event, the section 850 petition filed September 24, 2008, more than 5 ½ years after plaintiffs learned of the \$161,950 transfer to Erman, was time-barred. Irrespective of whether the petition was governed by the two-year statute for common count for money had and received (Code Civ. Proc., § 339) or the three-year statute for conversion (Code Civ. Proc., § 338), the section 850 petition was time-barred.

⁴ Section 850, subdivision (a)(3)(B) authorizes a trustee to file a petition “[w]here the trustee has a claim to real or personal property, title to or possession of which is held by another.”

d. *Bernard's opposition.*

Bernard contended Erman was bound by the judgment invalidating the seventh amendment, irrespective of whether Erman was formally made a party to the prior proceeding. Bernard pointed out that Erman was aware of the proceeding, she participated at trial as a witness, her paramour, Foley, litigated the matter through the final appeal, and Foley had the same interest as Erman in defending the seventh amendment to the Trust. Bernard argued “[p]resumably confident that her interests were well represented by Foley, Erman never sought to intervene, never objected to nonjoinder, and never objected to the Court’s jurisdiction. . . . There is no basis for her late-hour, ‘back-door, collateral attack’ on the judgment.”

Bernard further argued the section 850 was timely for the following reasons: Pursuant to the Supreme Court’s August 21, 2006 decision, and following the issuance of the remittitur, the trial court entered a final judgment on December 19, 2006, invalidating the seventh amendment. Within two years of the final judgment, on September 24, 2008, Bernard filed the petition under section 850. Thus, the petition was timely even under the shortest (two-year) limitations period asserted by Erman. *Moreover, it was not until the Supreme Court declared the seventh amendment invalid that Bernard had a cause of action to recover distributions from Erman.* The mere fact Foley filed an accounting in February 2003 which disclosed distributions to Erman in the sum of \$161,950 did not give rise to a cause of action at that time—at that time the seventh amendment was in force and had not been invalidated. The distributions were made under the authority of the seventh amendment and were valid on their face, until such time as the seventh amendment was invalidated.

e. *Trial court's ruling.*

On August 28, 2009, the matter came on for hearing. The trial court (Hon. Michael Levanas) granted summary judgment in favor of Erman on the ground “the underlying cause of action advanced by the Petition for Turnover Order [the section 850 petition] accrued no later than March 11, 2003.” It was on that date that Bernard “had knowledge of the February, 2003 Accounting” which disclosed the \$161,950

distribution by Foley to Erman. Because the cause of action accrued on March 11, 2003, the section 850 petition was untimely, regardless of whether it was governed by a two-year or a three-year statute of limitations. (Code Civ. Proc., §§ 338, 339.) The trial court also ruled “Bernard is not entitled equitable tolling of the statute of limitations for any reason”

The trial court did not address the alternate ground raised by Erman in her moving papers, i.e., that she was not bound by the judgment invalidating the seventh amendment.

Bernard filed a timely notice of appeal from the judgment.

CONTENTIONS

The trustee contends: Erman’s interest in the trust was invalidated by the 2006 judgment and Erman is bound by said judgment; the trust’s cause of action against Erman did not accrue until the judgment invalidating the seventh amendment to the trust became final and the trust had a right to reimbursement from Erman; the statute of limitations was suspended while the relatives’ section 17200 petition was pending and on appeal, and the section 850 petition is timely; even assuming a cause of action against Erman accrued before the 2006 judgment and was not stayed, the statute of limitations should be equitably tolled until that judgment became final.

DISCUSSION

1. Standard of appellate review.

Summary judgment “motions are to expedite litigation and eliminate needless trials. [Citation.] They are granted ‘if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.’ [Citations.]” (*PMC, Inc. v. Saban Entertainment, Inc.* (1996) 45 Cal.App.4th 579, 590.)

A defendant meets its burden upon such a motion by showing one or more essential elements of the cause of action cannot be established, or by establishing a complete defense to the cause of action. (Code Civ. Proc, §437c, subd. (p)(2); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 849.) Once the moving defendant has met its initial burden, the burden shifts to the plaintiff to show a triable issue of one or more

material facts exists as to that cause of action or a defense thereto. (*Aguilar*, at p. 849; Code Civ. Proc., §437c, subd. (p)(2).)

We review the trial court's ruling on a motion for summary judgment under the independent review standard. (*Rosse v. DeSoto Cab Co.* (1995) 34 Cal.App.4th 1047, 1050.)

2. *Erman is bound by the judgment invalidating the seventh amendment.*

We reject Erman's contention she is not bound by the judgment invalidating the seventh amendment to the Trust.

Although the section 17200 petition filed by the relatives to invalidate the seventh amendment was nominally directed only against Foley (the then trustee), the petition specifically prayed for an order determining that *both* "ANN ERMAN and JAMES H. FOLEY are disqualified persons within the meaning of Probate Code § 21350.5." Further, Erman was aware at all relevant times of the pendency of the petition to invalidate the seventh amendment, pursuant to which Foley and Erman each became a 50 percent residuary beneficiary (neither one having been named as a beneficiary in earlier versions of the Trust). Not only did Erman have actual notice of the section 17200 petition, but she also participated in the February 2003 trial on the petition as a witness. Further, Erman's interests were fully aligned with those of Foley, her paramour, who had an identical interest in defending the seventh amendment to the Trust. Because a decision invalidating the seventh amendment would have an adverse impact on Erman, she could have sought to intervene or to be formally added as a party in that proceeding. She evidently determined it was unnecessary for her to do so, in that Foley would vigorously defend the seventh amendment against the relatives' challenge. Erman's apparent reliance on Foley to defend the seventh amendment was well taken, in that Foley prevailed at the trial court level.

Further, all three courts which addressed the validity of the seventh amendment analyzed the conduct of Erman as well as Foley. The trial court, in denying the relatives' section 17200 petition to invalidate the seventh amendment, "conclude[ed] *neither Erman nor Foley* were care custodians." (*Bernard v. Foley*, *supra*, 39 Cal.4th at p. 799,

italics added.) This court reversed, “holding that *Foley and Erman* were ‘care custodians’ of decedent and they had failed to rebut the statutory presumption that decedent’s donative transfer to them was procured by undue influence.” (*Ibid.*, italics added.) The Supreme Court then affirmed the decision of this court, agreeing that “*Foley and Erman* fit the statutory definition of ‘care custodian.’ ” (*Id.* at p. 801, italics added.)

In fact, the Supreme Court’s decision contains a detailed analysis of Erman’s custodial care of decedent.⁵ If Erman were not a party to the section 17200 proceeding, the Supreme Court’s discussion of Erman’s custodial care of the decedent would have been an idle act. We decline to ascribe such a sterile intent to the high court.

Because Erman had notice of the section 17200 petition, participated in the trial thereof as a witness and was fully aligned with Foley who defended the seventh amendment, she was effectively a party to the proceeding and is bound by the final judgment invalidating the seventh amendment. We also note the prejudice to Erman from not being formally named as a party in the section 17200 petition is nonexistent.

We now turn to the statute of limitations question.

⁵ In addressing whether Erman was a care custodian, the Supreme Court stated: “Erman prepared meals for decedent, spent every day with her, assisted her in getting to and from the bathroom, helped her into bed, fixed her hair, cleaned her bedroom and did her laundry. Erman washed decedent’s face and hands on days when the visiting hospice nurses were not present to bathe her. She administered oral medications to decedent, including liquid morphine to assist decedent when she was having difficulty breathing, dosages of antidepressant drugs, anxiety medication and codeine cough syrup. She helped decedent apply ointments to a rash that had developed in her intimate areas. Erman also cared for decedent’s wounds, applying salves and antibiotics to sores on her legs and thereafter bandaging those areas. Devices for monitoring decedent’s breathing were placed in decedent’s and Erman’s bedrooms so that Erman could monitor decedent’s breathing. [¶] In sum, the record reflects that both Foley and Erman provided substantial, ongoing health services to decedent while, at the end of her life, she was residing in their home and that it was during this period that decedent amended her trust to include the donative transfers at issue.” (*Bernard v. Foley*, *supra*, 39 Cal.4th at p. 805.)

3. *Bernard's section 850 petition, filed within two years of the invalidation of the seventh amendment, is timely.*

The Supreme Court's decision, which determined the seventh amendment to the Trust was invalid, was filed August 21, 2006. (*Bernard v. Foley, supra*, 39 Cal.4th 794.) The remittitur to the superior court issued on October 4, 2006. Bernard filed the instant petition under section 850, seeking to recover Trust assets from Erman, within two years thereof, on September 24, 2008.

The trial court held the section 850 petition was untimely because the cause of action accrued no later than March 11, 2003, shortly after Foley's February 18, 2003 accounting which disclosed his transfer of \$161,950 to Erman. That ruling was erroneous. In March 2003, irrespective of Bernard's awareness of the transfer of funds to Erman, Bernard had no basis to seek a turnover order against Erman. It was not until the Supreme Court declared the seventh amendment invalid that Bernard could bring a petition to recover the distributions from Erman. The mere fact Foley filed an accounting in 2003 which disclosed distributions to Erman in the sum of \$161,950 did not give rise to a claim for recovery at that time. In 2003, the seventh amendment was still in force and the distribution to Erman, which had been made under the authority of the seventh amendment, was valid on its face, and would remain so until such time as the seventh amendment was finally determined to be invalid.

Even under the shortest statute of limitations asserted by Erman, namely, two years (Code Civ. Proc., § 339), the section 850 petition filed September 24, 2008 was timely. Further, under these circumstances, it is unnecessary to address whether this matter is governed by the two-year statute or by a longer statute of limitations, or whether equitable tolling should apply.

DISPOSITION

The judgment is reversed with directions to reinstate the action. Bernard shall recover costs on appeal.

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KLEIN, P. J.

We concur:

KITCHING, J.

ALDRICH, J.